Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 1156 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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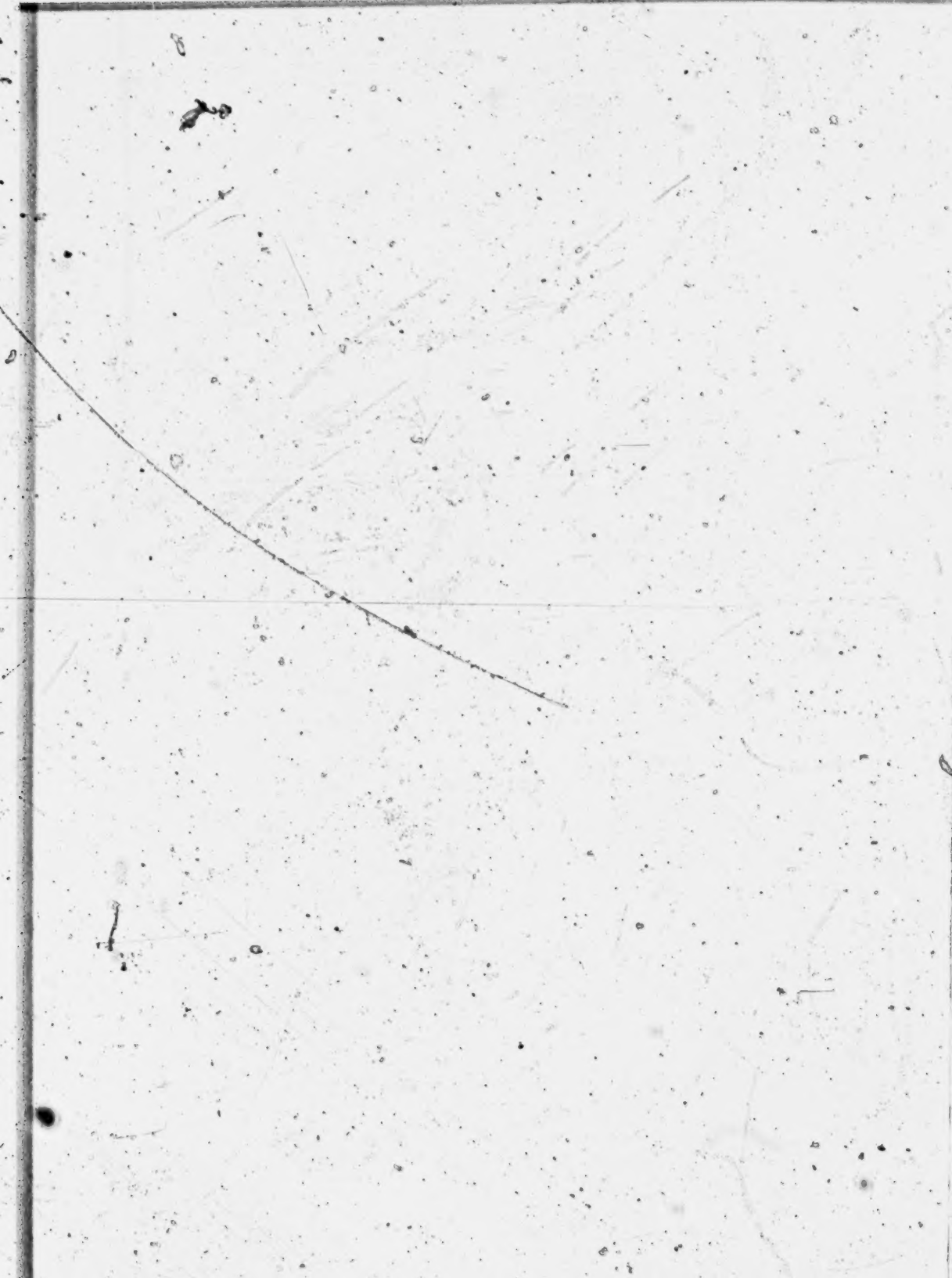
March, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030



INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitution Involved	4
Statement of the Case	5
Reasons for Granting the Writ	6
Conclusion	12

APPENDIX

Appendix A:

Judgment of Trial Court ..... i-ii

Appendix B:

Opinion and Judgment of Supreme Court of Oklahoma ..... iii-ix

AUTHORITIES

Cases:

Chambers v. Florida, 309 U.S. 227, 84 L.Ed. 716, 60 S.Ct. 472 11

Farmers and Merchants Nat. Bank v. Lee, 192 Okla. 9, 132 P.2d 931 9

Garrity v. New Jersey, — U.S. —, 17 L.Ed.2d 562, 87 S.Ct. — 11

Heckman v. United States, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820 6-7

INDEX CONTINUED

PAGE

Junction Oil & Gas Co. v. Pratt, 99 Okla. 14, 225 Pac. 717 — 8

Moore v. Dempsey, 261 U.S. 86, 67 L.Ed. 543, 43 S.Ct. 265 — 11

Murchison, In re, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 — 11

North American Petroleum Co. v. Knight (Okla.), 321 P.2d 964 — 8

Sadler v. Public National Bank & Trust Co., 172 F.2d 874 — 7

Statutes:

28 U.S.C.A. 1257 (2) (3) — 2

Oklahoma Constitution:

Art. 1, Sec. 1 — 4
Art. 2, Sec. 6 — 4, 10
Art. 2, Sec. 7 — 4

United States Constitution:

5th Amendment — 4, 5
14th Amendment — 4, 5

Rules and Regulations:

Code of Federal Regulations, Title 25, Sec. 172.23 — 2
Code of Federal Regulations, Title 30 (C.F.R.) January 1966 Revision, Secs. 221.3, 221.4, 221.18, 221.21, 221.62, 221.63 and 221.60 — 2
Code of Federal Regulations, Title 30, Ch. 11, Sec. 231.35 — 7-8, 9

Rules of the Supreme Court, Rule 19 — 2

7 F.R. 1433-4135-4140 — 2

INDEX CONTINUED PAGE

Textbooks and Miscellaneous:

16 Am.Jur.2d, Constitutional Law, Sec. 582, p. 988 11

Webster's Collegiate Dictionary, Fifth Edition, "Bias" 10

Webster's Collegiate Dictionary, Fifth Edition, "Influence" 10

Webster's Collegiate Dictionary, Fifth Edition, "Prejudice" 10

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioners pray that a writ of certiorari issue to the Supreme Court of Oklahoma to review the opinion and judgment of the Supreme Court of Oklahoma, of May 24, 1966. Petition for rehearing, timely filed, and denied on December 20, 1966, and application for leave to file second petition for rehearing denied on January 31, 1967.

OPINION BELOW

The opinion and judgment of the trial court and the Supreme Court of the State of Oklahoma are printed as an appendix hereto, as the same are not officially reported.

JURISDICTION

The opinion and judgment of the Supreme Court of the State of Oklahoma was entered on May 24, 1966 (Appendix hereto). A petition for rehearing was timely filed on July 8, 1966, and denied December 20, 1966. An application for second petition for rehearing was denied January 31, 1967. The jurisdiction of the court is invoked under Title 28 U.S.C.A. Section 1257 (2) (3) and Rule 19 of the Supreme Court of the United States. The petitioners have exhausted all of their state court remedies. The constitutional and federal questions were presented to the Supreme Court of the State of Oklahoma in the petition for rehearing and in the application for leave to file second petition for rehearing (R. 136 and 139), such constitutional and federal questions first arising herein on May 24, 1966, when the opinion and judgment of the Supreme Court of the State of Oklahoma was rendered and entered herein.

QUESTIONS PRESENTED

1. Whether the Supreme Court of the State of Oklahoma in its opinion and judgment of May 24, 1966, erroneously construed the terms and provisions of the Departmental Oil and Gas Mining Lease of Restricted Lands of the Indian Petitioners herein, and federal regulations pertaining thereto, *viz,* 7 F.R. 1433-4135-4140 and Title 30, Code of Federal Regulations (C.F.R.) January 1966 Revision, Section 221.3, 221.4, 221.18, 221.21, 221.62, 221.63 and 221.60 and Title 25 C.F.R. Section 172.23.

2. Whether the opinion and judgment of the Supreme Court of the State of Oklahoma herein is not in accord with applicable decisions of this Court.

3. Whether the Laws of the United States providing for Departmental Oil and Gas Mining Leases upon restricted lands of Indian petitioners, and all federal regulations pertaining thereto are for the protection of Indian petitioners, as lessors, and whether such federal regulations can be interposed by respondent lessee herein to avoid liability for damages resulting from breach of express and implied covenants of such oil and gas mining lease.

4. Whether Indian petitioners, as lessors in a Departmental Oil and Gas Mining Lease on restricted lands, can institute and maintain this action for damages for waste of natural gas by lessee in violation of the express and implied covenants of said lease contract, after due and proper notice has been given the United States, as by law provided, and the United States has elected not to enter such case in behalf of Indian lessors, petitioners herein.

5. Whether the opinion and judgment of the Supreme Court of the State of Oklahoma herein, in denying petitioners (Indian lessors) the right to institute and maintain this action against respondent (lessee) for damages for waste of natural gas by respondent in violation of express and implied covenants of Departmental Oil and Gas Mining Lease, when the United States after due notice elected not to enter into this case violates and offends the rights of petitioners herein under the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States and deprives petitioners of their property and rights without due process of law.

6. Whether the opinion and decision of the Supreme Court of Oklahoma herein has deprived petitioners of their

property and property rights without due process of law in violating Article 1, Section 1, Article 2, Sections 6 and 7, Constitution of Oklahoma and contrary to, and in violation of the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States inasmuch as said opinion and judgment resulted from a preliminary advisory opinion of private attorneys and there being no authority in the Constitution and laws of the State of Oklahoma authorizing any private attorney, or panel of private attorneys, to prepare an opinion for the Supreme Court of Oklahoma, advisory or otherwise.

CONSTITUTION INVOLVED

The Constitution of the State of Oklahoma, Article 1, Section 1:

> "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

Article 2, Section 6:

> "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for very wrong and and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

Article 2, Section 7:

> "No person shall be deprived of * * * property, without due process of law."

Constitution of the United States, 5th Amendment:

"No person shall be deprived of property without due process of law."

Constitution of the United States, 14th Amendment:

"Nor shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

On November 15, 1963, petitioners filed suit against respondent for damages alleging respondents breached express and implied covenants of a Departmental Oil and Gas Mining Lease upon the restricted Indian lands of petitioners who are Comanche Indians, by wasting natural gas from leased lands. Petitioners are lessors in said lease and respondent is lessee therein (R. pp. 5-14). Notice was given the United States (R. 39-43).

Respondent interposed a demurrer to petitioners' Amended Petition and the trial court sustained its demurrer, and entered judgment against petitioners (R. 97, Appendix A). An appeal was perfected to the Supreme Court of Oklahoma, and on May 24, 1966, an opinion and judgment of the Supreme Court of Oklahoma was entered affirming the judgment of the trial court (Appendix B). Petitioners filed a timely petition for rehearing, which was denied on December 20, 1966. An application for second petition for rehearing was denied on January 31, 1967.

Notice of appeal was filed and served upon respondent on February 1, 1967 (R. 142).

REASONS FOR GRANTING THE WRIT

The questions presented by petitioners not only are important to petitioners, as Indian citizens of the United States, but are important to every Indian citizen of the United States who owns restricted lands. The rights of all Indian lessors of restricted lands in Departmental Oil and Gas Mining Leases, as a class, are affected herein, and such rights should be determined by this Court.

This suit is one for money damages. Federal Regulations do not provide for assessment of money damages by administrative procedure. Federal Regulations do provide for cancellation of the lease for certain reasons. This suit is not for the cancellation of the oil and gas mining lease. It may be that administrative proceedings before the Secretary of the Interior are a condition precedent to an equitable proceeding to cancel the oil and gas mining lease involved. But that question is not before this Court herein. The question here is whether an Indian lessor can sue a lessee in a Departmental Oil and Gas Mining Lease for money damages for waste of natural gas by such lessee, and whether such Indian lessor can maintain such a suit after due notice has been given the United States and the United States has elected not to enter into the case.

In *Heckman* v. *United States*, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820, this Court determined a restricted allottee could sue or defend actions in his own behalf subject only to the right of the United States to intervene. In *Heckman*, it is said (56 L.Ed. 833):

> "In what cases the United States will undertake to represent Indian owners of restricted lands of this sort is left, under the acts of Congress, to the discretion of

the executive department. The allottee may be permitted to bring his own action, or, if so brought, the United States may aid him in its conduct, as in the Tiger case. . . ."

In *Sadler* v. *Public National Bank & Trust Co.*, 172 F.2d 874, the Court of Appeals of the Tenth Circuit held squarely that a restricted Indian is not without capacity to sue or to be sued with respect to his affairs, including his restricted property. The only difference between an Indian in such case as this, and other litigants, is that when such an Indian files suit notice must be served upon the United States, which notice was served in this case.

The *Heckman* and *Sadler* cases involved restricted Indians of the Five Civilized Tribes, and petitioners here are Comanche Indians, but we submit the principle is identical. These cases establish clearly that an Indian lessor in a Departmental Oil and Gas Lease, as well as the United States, has the capacity to sue relative to causes of action arising from breach of covenants of such a lease.

The opinion of the Supreme Court of Oklahoma states in part (Appendix B, pp. x, xi):

> "The lessee is entitled to rely upon the directions of the Secretary of the Interior and his subordinate officers, made under the terms of the lease and such rules and regulations, in devolping and operating the lease, and in the absence of a violation of any such direction it is not liable in a suit for damages. . . ."

Title 30, Chapter 11, Section 221.35, C.F.R. provides as follows:

"§ 221.35 Waste prevention: beneficial use.

"The lessee is obligated to prevent the waste of oil or gas and to avoid physical waste of gas the lessee shall consume it beneficially or market or return it to the productive formation. If waste of gas occurs the lessee shall pay the lessor the full value of all gas wasted by blowing, release, escape, or otherwise at a price not less than 5 cents for each 1,000 cubic feet, unless, on application by the lessee, such waste of gas under the particular circumstances involved shall be determined by the Secretary to be sanctioned by the laws of the United States and of the State in which it occurs. The production of oil and gas shall be restricted to such amount as can be put to beneficial use with adequate realization of value and in order to avoid excessive production of either oil or gas, when required by the Secretary, shall be limited by the market demand for gas or by the market demand for oil."

Petitioners allege in their amended petition that demand was made upon respondent lessee to market gas being produced and flared from producing wells; that there was a pipeline for market of such gas within one half (½) mile of said wells; that respondent lessee wrongfully and illegally committed waste of such natural gas; and that petitioners, as lessors, were damaged in the sum of $114,000.00 (R. 83-88).

Under the law of Oklahoma a lessee in an oil and gas lease is liable in damages for waste, and failure to market gas produced. *Junction Oil & Gas Co.* v. *Pratt*, 99 Okla. 14, 225 Pac. 717; *North American Petroleum Co.* v. *Knight* (Okla.), 321 P.2d 964.

Herein petitioners have sued respondent for money damages alleging breach of express and implied covenants

of said oil and gas mining lease. The express provisions of the lease pleaded (R. 10-14), and the allegations of wrongful and illegal waste of natural gas by respondent (R. 83-88) clearly state a cause of action.

We assert herein that under the lease itself, and under the Federal Regulations, Title 30, Section 221.35, C.F.R., *supra*, the representatives of the United States could not permit or condone the wasting of natural gas by respondent. The only circumstances where such conduct of respondent lessee would be sanctioned legally would be under facts which would be sanctioned by both the laws of the United States and the State of Oklahoma.

The trial court sustained a demurrer of respondent (R. 57 and Appendix A). The Supreme Court of Oklahoma in its opinion affirmed the trial court (Appendix B). A demurrer, under the law of Oklahoma, admits the truth of all allegations, and reasonable inferences to be drawn therefrom. *Farmers and Merchants Nat. Bank* v. *Lee*, 192 Okla. 9, 132 P.2d 931.

We submit that inasmuch as petitioners allege ". . . that said defendant failed and refused to market said gas . . . wrongfully permitted gas to flare and escape from said wells, as aforesaid, and has illegally committed waste in the premises . . ." (R. 85), and respondent's demurrer has admitted the truth of said allegations, the opinion and judgment of the Supreme Court of Oklahoma is erroneous, and a writ of certiorari herein should be granted.

Petitioners contend there is an additional reason for granting a writ in this case. The opinion of the Supreme Court of Oklahoma shows on its face that a panel of three

(3) private attorneys prepared a preliminary advisory opinion for the Supreme Court of Oklahoma. Petitioners had no notice or knowledge of the participation of the private attorneys in the decision and opinion of the Supreme Court of Oklahoma until the said decision was entered.

Article 2, Section 6, Oklahoma Constitution provides that right and justice shall be administered by the courts of justice of Oklahoma without sale, denial, delay or prejudice.

We submit that this Court has been *influenced* by the advisory opinion of the panel of three (3) lawyers engaged in the private practice of law.

"Prejudice" is defined in Webster's Collegiate Dictionary, Fifth Edition, as follows:

> "To cause to have prejudice; Bias the mind of: as, to prejudice the members of a jury."

"Bias" is defined in Webster's Collegiate Dictionary, Fifth Edition, as follows:

> "Biased or Biassed: Biasing or Biassing: To give bias to: to influence: prejudice: preposses."

"Influence" is defined in Webster's Collegiate Dictionary, Fifth Edition, as follows:

> "The act or the power of producing an effect without apparent force or direct authority: an influence by suggestion."

The impetus of our argument in this respect is that the decision and opinion of the Supreme Court of Oklahoma was influenced by a panel of three private lawyers. We do not charge any corruption, nor ulterior motives of anyone.

But we do assert that the opinion and decision of the Supreme Court of Oklahoma was the result of influence upon the Supreme Court, in violation of the Constitution of Oklahoma and the same offends and violates the rights of petitioners under the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States.

We submit that influence can be exercised by mental persuasion, which is tantamount to coercion. *Chambers* v. *Florida,* 309 U.S. 227, 84 L.Ed. 716, 60 S.Ct. 472; *Garrity* v. *New Jersey,* — U.S. —, 17 L.Ed.2d 562, 87 S.Ct. —.

The fairness requisite to due process requires an absence of actual bias in the trial of cases. *In re Murchison,* 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623, it is said:

> "A fair trial in a fair tribunal is a basic requirement of due process."

See also 16 Am.Jur.2d, Constitutional Law, § 582, p. 988; *Moore* v. *Dempsey,* 261 U.S. 86, 67 L.Ed. 543, 43 S.Ct. 265.

Actually, in this case, the panel of private attorneys who prepared the preliminary advisory opinion herein performed a function the same as if they had been advocates for respondent. The converse would apply if their preliminary advisory opinion had been favorable to petitioners. There is no statute, or constitutional provision, in Oklahoma authorizing private attorneys to prepare opinions for the Supreme Court of Oklahoma, advisory or otherwise. Clearly these private attorneys influenced the decision and opinion herein.

The basic requirements of the Fourteenth Amendment apply to property rights in civil litigation the same as life and liberty in criminal proceedings. Herein, every Indian resident and citizen who owns restricted land is affected. Also every citizen of Oklahoma is affected.

We respectfully submit that the questions involved herein are of great public interest and affect a great number of people as a class, and pray that this Court, in its sound judicial discretion, grant the Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Respectfully submitted,

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218 Oklahoma Journal Building
Midwest City, Oklahoma 73110

HOUSTON BUS HILL
1415 First National Building
Oklahoma City, Oklahoma

Attorneys for Petitioners

March, 1967

APPENDIX A

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY AND LAVERNE AITSON,
Plaintiffs,

vs

No. 154040

SKELLY OIL COMPANY, a corporation,
Defendant.

ORDER SUSTAINING DEMURRER AND JUDGMENT DISMISSING CAUSE

Now on this 20th day of September, 1963, there comes on for further hearing and decision upon the demurrer of the defendant, Skelly Oil Company, to the Amended Petition of the plaintiffs. The plaintiffs appear by their attorneys of record, Charles Hill Johns and Houston Bus Hill and the defendant appears by its attorneys of record, S. W. Wells and John H. Cantrell.

The case having been called and the parties so appearing, the Court announces that the Court has concluded that the said demurrer of said defendant should be sustained. The Court, therefore, finds and orders that said demurrer to said Amended Petition be sustained, to which finding and order of the Court plaintiffs and each of them except and exceptions are allowed. Plaintiffs elect to stand upon their said Amended Petition and decline to plead further, whereupon the Court finds and orders that plaintiffs' said Amended Petition and the above styled and numbered cause each should be and is hereby dismissed at plaintiffs' cost, to which actions of the Court, the plaintiffs and each of them except and exceptions are allowed.

The plaintiffs, and each of them, thereupon give notice in open court of their intention to appeal to the Supreme

Court of Oklahoma and ask and direct that such notice of intention to so appeal be entered upon the trial docket of the Court which is accordingly done. Plaintiffs, and each of them, having requested an extension of time of thirty days in addition to the time allowed by law, and to-wit: 45 days from this date, in which to make and serve case-made upon such appeal, such request is granted and plaintiffs are hereby granted and allowed an extension of time of thirty days in addition to the time allowed by law, and to-wit: 45 days from this date, within which to make and serve case-made upon appeal to the Supreme Court of Oklahoma. The parties are granted three days from and after the date of service of the said case-made within which to suggest amendments thereto with said case-made to be settled and signed upon three days notice in writing given by plaintiffs to defendant or by defendant to plaintiffs.

/s/ A. P. Van Meter
District Judge

OK as to form:

/s/ Houston Bus Hill
/s/ Charles Hill Johns

Attorneys for Plaintiffs

/s/ John H. Cantrell
/s/ S. W. Wells

Attorneys for Defendant.

ENDORSED:
FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
Sep 25 11:37 AM '63
DALE SMITH, COURT CLERK
BY D. J. Fowler

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY and LAVERNE AITSON,

PLAINTIFFS IN ERROR,

VS. No. 40777.

SKELLY OIL COMPANY, A Corporation,

DEFENDANT IN ERROR.

SYLLABUS

1. The rules and regulations made by the Secretary of the Interior, pursuant to the terms of a Departmental Oil and Gas Lease covering restricted Indian lands, have the force and effect of law, and the courts of Oklahoma take judicial notice of the same.

2. Where the lessee of a departmental oil and gas lease covering restricted Indian lands does not violate any of the directions of the Secretary of the Interior or his subordinate officers in the operation of such lease made pursuant to the terms of the lease or the valid rules and regulations made by the Secretary of the Interior, such lessee is not liable in damages for the manner it has operated said lease in a suit by the restricted Indian lessors.

[APPENDIX]

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY.
HON. A. P. VanMETER, JUDGE.

Action by Frank Poafpybitty et al against Skelly Oil Company for damages. From a judgment sustaining defendant's demurrer to plaintiffs' amended petition and dismissing the cause, plaintiffs appeal.

AFFIRMED

Charles Hill Johns, and
Houston Bus Hill,
Oklahoma City, For Plaintiffs in Error,

S. W. Wells, Tulsa, and
John H. Cantrell,
Cantrell, Douglass, Thompson & Wilson,
Oklahoma City, For Defendant in Error.

PER CURIAM:

This is a suit by the restricted Indian heirs of a member of the Comanche tribe of Indians to whom, an allottee, a tract of land in Stephens County was conveyed by a trust patent from the United States, in which the plaintiffs seek to recover from the defendant, Skelly Oil Company, lessee under a departmental oil and gas lease, royalties on gas which the plaintiffs allege the company permitted to escape and go to waste from the land. From a judgment of the District Court of Oklahoma County sustaining the demurrer of the defendant to the amended petition of the plaintiffs and dismissing the cause on their refusal to plead further, this appeal was prosecuted.

In the amended petition the plaintiffs alleged that they are the owners and in possession of a quarter section of land in Stephens County, said land being held in trust for them by the United States Government under the General Allotment Act of February 8, 1887, said lands being under the jurisdiction and control of the Secretary of the Interior acting by and through the Area Director of the Bureau of

Indian Affairs and the Commissioner of Indian Affairs; that on May 28, 1947, the plaintiffs, as lessors, executed and delivered to the defendant, Skelly Oil Company, as lessee, a departmental oil and gas lease which was approved by the Acting Commissioner of Indian Affairs of the United States Department of the Interior, for a primary term of ten years, which expired June 27, 1957, same to continue as much longer thereafter as oil and/or gas is produced in paying quantities from said land. A copy of the lease was attached to and made a part of the petition.

Plaintiffs further alleged that during the year 1956 the lessee drilled seven oil and gas wells on said land, all of which wells were completed as commercial producers; that shortly after the wells were completed demand was made by the plaintiffs on the lessee to market the gas being produced and flared from said wells, there being a gas line operated within a half mile from said land; that the defendant lessee failed and refused to exercise reasonable diligence in the prevention of waste of said gas as required by the lease, but, instead permitted the gas to escape and become wasted, contrary to the terms of the lease, causing the plaintiffs to lose their royalty from said escaping gas in the sum of $114,000.00, for which they prayed judgment.

Plaintiffs further alleged that they are the real parties in interest and that the United States is trustee for their benefit, and that the United States has consented to instituting this action by the plaintiffs and has authorized the plaintiffs to employ attorneys for the prosecution of the case.

The lease provides that the lessee shall pay to the Secretary of the Interior a royalty consisting of 12½% of the value or amount of all oil, gas, natural gasoline and all other hydrocarbon substances produced and saved from the leased land, save and except oil and/or gas used by the lessee for development and operation purposes on the leased premises, which shall be royalty free; that lessee shall furnish the Secretary of the Interior monthly statements

[APPENDIX]

showing the amount, quality and value of all such products produced and saved from the leased premises during the preceding calendar month; that the leased premises and wells, producing operations, improvements, machinery, and fixtures on said lease and connected therewith, and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized representative of the Secretary of the Interior; that the lessee shall exercise reasonable diligence in drilling and operating wells for oil and gas purposes, and shall carry on all operations in a good and workmanlike manner in accordance with approved methods and practice having due regard for the prevention of waste of oil and gas developed on the land; shall carry out at its expense all reasonable orders and requirements of the oil and gas supervisor of the Department of the Interior relative to the prevention of waste and preservation of the property and the health and safety of workmen; that it shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to the lease; that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor. The lease gives the Secretary of the Interior the right to declare the lease null and void, after notice and hearing, for violation of any of the terms and conditions of the lease *before restrictions are removed,* "provided that after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee."

The plaintiffs argue the case under two propositions:

1. That as beneficial owners of the land and lessors they have the right to maintain this action, notwithstanding the fact that as Indian Citizens they hold equitable title

under a Trust Patent and the lease was required to be approved by the Commissioner of Indian Affairs, citing 42 C.J.S. Indians, sec. 8, page 653; Smith v. Northern Pacific Rep. Co., 57 Mont. 14, 186 P. 684, 686; Sadler v. Public National Bank and Trust Co. of New York, 172 F.2d 870; Bonnet v. Seekins, 243 P.2nd 239 (Mont.); Brown v. Anderson, 160 P. 724, 61 Okl. 136; Choctaw and Chickasaw Nations v. Seitz, 193 F.2d 456.

2. That as such beneficial owners, they have the right to maintain this action without joining the United States, which holds the land as trustee for them, citing Bush v. Missouri State Life Ins. Co., 207 P. 317, 86 Okl. 182; Smith v. Burt, 300 P. 748, 160 Okl. 34; Siniscal v. United States, 208 F.2d 48.

The defendant argues the case under four propositions, but we believe its first proposition is decisive in its favor, which is that under the express terms of the lease and the regulations of the Secretary of the Interior made pursuant to law and which must be read into the lease, the plaintiffs are precluded from suing or recovering in this action.

The defendant calls attention to numerous rules and regulations promulgated by the Secretary of the Interior dealing with such departmental oil and gas leases, which have the force and effect of law, and of which the Federal and State courts take judicial notice. Diehl v. Phillips Petroleum Co., 376 P.2d 203 (Okl.); Seber v. Spring Oil Co., 33 F.Supp. 805. The regulations so prescribed among other things, define the duties of the supervisor, who is a representative of the Secretary of the Interior, under directions of the Director of the United States Geological Survey, in supervising and directing oil and gas operations. Among such regulations that are pertinent to the questions here involved are those appearing at 7 F.R. 1433-4135-4140 and Title 30, Code Of Federal Regulations (CFR), January, 1966 Revision, in part, as follows:

(§221.3) "Drilling and producing operations, handling and gaging of oil and the measurement of gas or other products, determination of royalty liability, receipt and delivery to those entitled thereto of royalty accruing to the lessor and paid in the amount of production, determination of amount and manner of payment of damages assessed under authority of the regulations in this part for defaults or non-compliance with duties by the lessee and, in general, all operations subject to the regulations in this part are under the jurisdiction of the supervisor for any district as delineated by the Director. As to producing leases of Indian lands, the officer in charge, and as to land within naval petroleum reserves, the supervisor shall determine rental liability, record rentals, royalties, and other payments, and maintain lease accounts. * * *."

(§221.4) "The supervisor is hereby authorized to require compliance with lease terms, with the regulations in this part, and all other applicable regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas, or other products with minimum waste. Inasmuch as conditions in one area may vary widely from conditions in another area, the regulations in this part are general, and detailed procedure hereunder in any particular area is subject to the judgment and discretion of the supervisor, and to any areal plan of development that may be adopted pursuant to law. * * *."

(§221.18) "The lessee shall comply with the terms of the lease, and of the regulations in this part and any amendments thereof, and with the written instructions of the supervisor, . . . * * *."

(§221.21) "The lessee shall drill diligently, and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of

drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the sum to be computed monthly by the supervisor. * * *."

(§221.62) "When directed by the supervisor, a monthly report shall be made by the lessee in duplicate, on Form 9-361 or 9-361A, showing each run of oil, all sales of gas, gasoline, other lease products, and the royalty accruing therefrom to the lessor. * * *."

(§221.63) "Form 9-614A, completely filled out and signed, shall be submitted to the supervisor in triplicate and shall accompany each remittance covering payments of royalty or rental on Indian lands."

(§221.60) "A separate report of operations for each lease must be made on Form 9-329 for public land and on Form 9-329A for Indian land, for each calender month, beginning with the month in which drilling operations are initiated, and must be filed in duplicate with the supervisor on or before the 6th day of the succeeding month, unless an extension of time for the filing of such report is granted by the supervisor. * * *."

Tit. 25 CFR, sec. 172.23 provides in part:

"(A) A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provision of the lease or of any regulations heretofore or hereafter prescribed have been violated. * * *."

The regulations provide for appeals from orders made, under the regulations to the Director and from the Director to the Secretary, and procedure for such appeals is prescribed.

We do not find the authorities relied upon by the plaintiffs helpful in deciding their right to prosecute this

action and recover judgment. None of those authorities deals with the rights and liabilities of the parties to a Departmental oil and gas lease giving the Secretary of the Interior and his subordinates wide authority over the development and operation of such leases as is the case under the terms of the lease and the regulations that apply to it, made pursuant to the law and the terms of the lease, which are herein quoted. Nor does the defendant cite any cases dealing specifically with the rights of lessor under such a lease.

The Secretary of the Interior is in effect made guardian of the restricted Indian lessors in dealing with the lessee in the development and operation of the lease and the lessors are given no express authority to deal with the lessee in its development and operation. The lessee is required to comply with the written directions of the Supervisor in carrying out the terms of the lease and applicable regulations, and the Secretary of the Interior may cancel the lease on application of the lessors for failure of the lessee to comply with the provisions of the lease or regulations, and there is no allegation in the petition that the defendant has failed to comply with any directions given it by the Supervisor. The exclusive authority of the Secretary of the Interior and his subordinate officers shall continue so long as the restrictions on the Indian lessors are in effect. In paragraph 6 of the lease, it is provided "that after the restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee." We think, under the maxim *"expressio unius est exclusio alterius,"* this provision deprives the lessors of the right to prosecute a suit for breach of the lease contract until the restrictions are removed, and there is no allegation in the petition that the restrictions have been removed.

The lessee is entitled to rely upon the directions of the Secretary of the Interior and his subordinate officers, made under the terms of the lease and such rules and regulations, in developing and operating the lease, and in the absence

of a violation of any such direction it is not liable in a suit for damages. The fact that the United States authorized the plaintiffs to employ counsel and consented to the filing of the suit, as alleged in plaintiffs' petition, did not create a cause of action in favor of the plaintiffs contrary to the terms of the lease and the rules and regulations promulgated by the Secretary of the Interior.

The trial court properly sustained the demurrer to the amended petition.

Judgment affirmed.

The Court acknowledges the services of Thurman S. Hurst, who with the aid and counsel of George S. Downey and David L. Fist, as Special Masters, prepared a preliminary advisory opinion. These attorneys had been recommended by the Oklahoma Bar Association and appointed by the Court. The Chief Justice then assigned the case to Blackbird, J., for review and study, after which and upon consideration by the Court, the foregoing opinion was adopted.

JACKSON, V. C. J., and DAVISON, WILLIAMS, IRWIN, BERRY, HODGES and LAVENDER, JJ., concur.